

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
2010 Quadrennial Regulatory Review – Review of the)	MB Docket No. 09-182
Commission’s Broadcast Ownership Rules and Other)	
Rules Adopted Pursuant to Section 202 of the)	
Telecommunications Act of 1996)	

To: Office of the Secretary
Attn: Chief, Media Bureau

REPLY COMMENTS OF THE
MID-ATLANTIC COMMUNITY PAPERS ASSOCIATION
ASSOCIATION OF FREE COMMUNITY PAPERS
AND THE FREE COMMUNITY PAPER INDUSTRY

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Summary

Any tampering with the newspaper/broadcast cross-ownership rules in the direction of further deregulation will most certainly trigger an unprecedented wave of cross-media consolidation, strangling the remaining competition and putting local economies at serious risk. The documented merger challenge history of the DOJ and FTC ensures that not much will stand in their way. The free community paper industry competes with the proponents of cross-media consolidation every day on Main Street. We keep Gutenberg's print legacy alive and relevant, embracing free and fair competition as modern day Town Criers, often from the short end of the stick.

In doing so we provide a service to our communities and an essential resource for local business, the lifeblood of our collective economies. We submit that the more some things have changed the more some things stay the same, including the trend toward greater consolidation in local media. As ownership shrinks to fewer and fewer capitalized concerns, some argue for new cross-media acquisition opportunities. Even as they lament their stock prices, they propose pulling local media from community reliance and subjecting them to the same whims of Wall Street. Faceless shareholders replace community stakeholders, and the fiduciary responsibilities to the parent company take precedence over the needs, concerns and values of the community.

Some argue that the Internet provides an excuse to relax competitive safeguards. It would seem that if the Internet were as transformational as the energetic language offered by certain commenters, arguments to overturn the rules relating to mature media would be abandoned in favor of focusing all energies on maximizing current success in internet ventures. The act of leveraging internet properties and innovation are not unduly restricted by regulation, and not at all by the safeguards against newspaper/broadcast cross-ownership. The fact that certain commenters in the print and broadcast industries

are still arguing for the opportunity to cross-merge, is a tacit admission that they do recognise their continued relevance and market dominance even in this new world where computers and gadgets are interconnected in real time.

Those who lament “heavy-handed government regulation of the media,” often fail to mention their own successful pleas for privileged statutory protection. Those heavy-handed, legalized market-place advantages include the Newspaper Preservation Act, Periodicals Mail Privileges and in most states, the exclusive market on government mandated advertising, known as Legal and Public Notice. From our position in the local media landscape, we contend that the current level of concentration in local media markets makes the ban on newspaper-broadcast cross-ownership more critical now than when it was first enacted. We urge the Commission to preserve these vital safeguards.

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Mid-Atlantic Community Papers Association and Association of Free Community Papers, on behalf of Midwest Free Community Papers, Community Papers of Michigan, Free Community Papers of New York, Community Papers of Florida, Community Papers of Ohio and West Virginia, Southeastern Advertising Publishers Association, Texas Community Newspaper Association, and Wisconsin Community Papers (collectively “Free Community Paper Industry”), take this opportunity to bring our truly local, market-based perspective to the Commission’s 2010 Quadrennial Regulatory Review. We hereby submit this reply in response to the Commission’s invitation extended in its *NOTICE OF INQUIRY*,¹ as well as to certain comments filed thereto. In the *NOI*, the Commission seeks detailed comment on a sweeping range of interrelated matters including whether, and if so to what extent, and specifically how the Commission should revise the longstanding newspaper/broadcast cross-ownership rule. This rule,

¹ 2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, Notice of Inquiry, FCC 10-92, MB Docket No. 09-182 (rel. May 25, 2010) (“2010 Quadrennial Review NOI” or “NOI”).

revised under the prior Review and still being challenged in the Third Circuit Court of Appeals, generally bars common ownership of a broadcast station and a daily newspaper in the same market. 47 C.F.R. § 73.3555(d). Comments have been submitted in response to this *NOI* by numerous corporations in the newspaper publishing and broadcasting industries, trade associations, local media outlets, consumer and other advocacy groups, as well as concerned private citizens.

Two distinct sets of opinion have been expressed to date to the Commission regarding the long-standing newspaper/broadcast cross-ownership rules. Commenters with the access to capital and the economies of scale to leverage cross-media acquisitions argue for lifting current regulatory safeguards. Commenters representing a broader range of social and economic interests and diverse perspectives, conclude that robust safeguards remain most necessary for American society and should therefore be preserved and even strengthened. In this reply, the Free Community Paper Industry agrees with the majority of commenters that community interests compel at least the retention of current newspaper/broadcast cross-ownership rules, and that a return to their original form would best serve the broadest public interest.

I. Background

For the record, the Free Community Paper Industry participated actively in the last Quadrennial Review of Media Ownership, filing formal Comments and sharing testimony on panels at field hearings across the country.² We take mindful note of the Commission's pledge to begin this Review with a clean slate and an open mind:

² See Gary Cunningham, Publisher, GCA Publishing, Nashville Community Newspapers, FCC Hearing Panel Testimony, Nashville, TN, December 11, 2006; Jim Haigh, Mid-Atlantic Community Papers Association, FCC Hearing Panel Testimony, Harrisburg, PA, February 23, 2007; Steve Erlanger, Publisher and Chief Operating Officer, Hometown News, FCC Hearing Panel Testimony, Tampa, FL, April 30, 2007; Patrick Manteiga, Publisher, La Gaceta, FCC Hearing Panel Testimony, Tampa, FL, April 30, 2007; Victor Jose, retired Publisher and Author, The Free Paper in America, FCC Hearing Testimony, Chicago, IL, September 20, 2007. See also: *Reply Comments of the Mid-Atlantic Community Papers Association, joined by The Industry*, January 16, 2007, to the FCC, 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; MB Docket No. 06-121

“we commence this proceeding with no preconceived notions about the framework that will result from this review or what rules we will adopt. We will examine ownership issues based on the record that is established in this proceeding and will seek to establish a forward-looking framework based on the media marketplace of today.”³

We must note, however, that while actions of the prior Commission made us skeptical, current events give us some degree of concern. Well into the last Review, hidden documents finally surfaced including a report on radio consolidation unfriendly to a competition-gutting agenda, as well as a blueprint from the Commission’s then Chief Economist formulated to proactively render Everytown, USA in need of Newspaper/Broadcast Cross-ownership. The icing on that Rulemaking’s agenda came at endgame, when then Chairman Martin admitted before Congress that the outcome was actually predetermined. Moreover, when challenged to recall any opposition from the publishing industry, the Commission’s Chairman could not recall any of the numerous groups associated with filed comments and their member publishers that testified directly before him across the country.

We file these Comments trusting that they will be duly considered, holding faith that the Commission’s reiteration of its “clean slate” pledge in its filing before the Third Circuit Court of Appeals⁴ trumps all other troubling language in that brief. Chairman Genachowski’s characterization in his Official Statement regarding the filing of that legal brief, that the current Commission is merely supporting the prior Commission’s authority and not its conclusions, gives us some basis for optimism in that regard.⁵

In its warm up to the current Review, the Commission has so far held a series of limited venue

³ See *2010 Quadrennial Review NOI* at para 3.

⁴ See *BRIEF FOR FCC AND UNITED STATES IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*, July 21, 2010, at 36.

⁵ See *FCC CHAIRMAN JULIUS GENACHOWSKI STATEMENT ON 3RD CIRCUIT MEDIA OWNERSHIP FILING*, July 21, 2010: “Today our General Counsel filed a brief in the U.S Court of Appeals for the Third Circuit defending the (prior) Commission’s authority to make the changes to our media ownership rules.”

so-called “workshops.” In these relatively intimate settings, staff has heard from a few public interest groups, from investment and finance interests, experts on all things digital, and in some cases even some citizens -- but mostly so far from the largest media players pushing for the complete gutting of safeguards against Newspaper/Broadcast Cross-ownership. One cross-owning practitioner alone has appeared twice in these workshops, while a total of one hometown weekly has so far been invited to the public forum portion of the process.⁶ We trust that the Commission will schedule robust field hearings across the country, organized for maximum public attendance and representative of all local media enterprises with a vested interest in the ultimate policy outcomes. We applaud Commissioner Copps for staunchly championing the same.⁷

This Review takes place against the backdrop of two additional and concurrent policy inquiries focused on sustainable models for serving the public’s information needs. The Commission might take note that their sister agency, the Federal Trade Commission, took considerable heat when it released the “Staff Discussion Draft,” so much so that they felt compelled to issue a formal follow-up explanation. While some characterizations of the document blew its significance out of proportion, they critically noted just as the document itself admitted, it was newspaper-centric. To be more accurate, it had a lopsided hyper-focus on pay-to-read regional daily newspapers to the exclusion of other hometown publishers and competing media outlets. We noted that similarity of attention in this Commission’s own “Future of Media” proceeding, urging a fuller appreciation of the longstanding role and function of free

⁶ That company, Media General, has already catalogued an impressive 15 filings as of July 24, 2010 in this very Review, beyond Comments are several Notifications of Ex Parte Communications with Commissioners’ senior staff as well chiefs and senior staff of divisions including Media Bureau and Strategic Planning and Policy. It must be noted that this extreme level of deep-pocketed persistence was seemingly rewarded in the 2006 Review: Media General’s own data was used as a basis for former FCC Chief Economist formulated to render Everytown, USA in need of Newspaper/Broadcast Cross-ownership.

⁷ “I look forward to a full and creative record nourished by the widest possible public participation....I hope that the Commission will “go on the road” in the months ahead to hear directly from consumers and citizens. I know of no better way for us to educate ourselves about the problems faced by, and the solutions sought by, the American people.” See *STATEMENT OF COMMISSIONER MICHAEL J. COPPS Re: Notice of Inquiry Seeking Comment on Media Ownership Rules in the 2010 Quadrennial Regulatory Review Proceeding*, May 25, 2010.

community papers in their local media ecosystems.⁸

II. Introduction

The Commission is directed by the Communications Act to place the broad public interest above the narrow interest of broadcasting and daily newspaper corporations. As the Commission duly notes on that threshold, “In *Prometheus Radio Project, et al. v. FCC*, 373 F.3d 372 (3d Cir. 2004) (“*Prometheus*”), the Third Circuit concluded that “necessary in the public interest” is a “‘plain public interest’ standard under which ‘necessary’ means ‘convenient,’ ‘useful,’ or ‘helpful,’ not ‘essential’ or ‘indispensable.’”⁹ This reasoned threshold ensures that the common good of all citizens, as well as those enterprises competing locally at a disadvantage, will hold sway over forces primarily seeking competitive advantage and financial gain. While some commenters would prefer “public interest” to mean deference to their “orderly transaction planning” or serve their limited wants for “adequate predictability for the industry” to begin the final wave of cross-media consolidation unchallenged,¹⁰ we submit that such designs are clearly not a “plain public interest.”

A critical pillar of communications policy is the understanding that “in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field.”¹¹ The preservation of fair competition in the broadcasting industry has traditionally served as the guiding principle to balance these interests. With regard to preserving the broad public interest, we continue to agree emphatically with the reasoned analysis of Daily News, L.P. (“Daily News”), that

⁸ See Comments of the Free Community Paper Industry, In the Matter of: Examination of the Future of Media and the Information Needs of Communities in a Digital Age, GN Docket No. 10-25, May 7, 2010, at 3: “Seemingly robust, diverse and inclusive, the bulky collection of one hundred thirty-two (132) different titles had not one recommended reading substantially dedicated to the longstanding role and function of free community papers in their local media ecosystem. More accurately, no study gives even a hint of the mere existence of our \$4 billion industry and the over one hundred million (100,000,000+) copies we collectively share with communities across our country each week.

⁹ See 2010 Quadrennial Review NOI at footnote 2.

¹⁰ See Comments of the Newspaper Association of America, 2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, Notice of Inquiry, FCC 10-92, MB Docket No. 09-182, July 12, 2010, at 9.

¹¹ See *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940).

“consumers receive more choice, lower prices and more innovative services in competitive markets than they do in markets where one or more firms exercise market power. A market structure limiting the ability of one entity to own television stations and newspapers is more likely to result in vigorous competition. As the Commission has noted, the aggregation of inordinate market share by a small number of firms will tend to harm public welfare since highly concentrated markets tilt the proper balance of power too far in favor of some firms and against those who could challenge them.”¹² It should be particularly noteworthy to the Commission that these remarks came from a daily newspaper with the sufficient economy of scale to leverage cross-media acquisitions, operating in one of the rare media markets served by competing daily newspapers.

The atypical New York market serves as contrast to the majority of media markets, where inordinate market share is currently held by the natural monopoly daily newspaper. Concrete analysis has repeatedly detailed the settled fact that, in virtually all American communities, any single cross-media acquisition would lead to an aggregation of market share for the merged entity well above Department of Justice and Federal Trade Commission Guidelines.¹³ The market power achieved through size, range, scope and economic force is not the only resulting factor sought by proponents of such combinations. Missing from the comments of those advocating the abolishment of current safeguards, but duly noted by certain commenters favoring fair competition, is the full and dangerously anti-competitive potential of their vertical integration ambitions.

Our member publishers, battling every day in their hometown markets, delivered consistent, cautionary panel testimony in hearing after hearing. They shared their real-world examples and con-

¹² See Comments of Daily News, L.P. at 11.

¹³ See Mark Cooper, *How Bigger Media Will Hurt Pennsylvania: A Report On Pennsylvania Media Markets and the Impact of Newspaper/TV Cross-Ownership Mergers*, McGannon Communications Research Center, October 2006. “The results are stark. In every case, we find that Pennsylvania citizens already face highly concentrated markets with few choices of news and views. Possible mergers would only make matters worse, risking both localism and democracy. Even in Philadelphia, one of the largest and least concentrated markets in the country, any cross-media merger involving the top two firms would increase concentration in excess of the Department of Justice and Federal Trade Commission Merger Guidelines. In the smaller markets, the outlook is even worse.” *Note*: Cooper’s analysis and conclusions were consistent in related reports on media markets in Arkansas, California, Florida, Maine, Michigan, Montana, Ohio, Oregon, Texas, Virginia and Washington.

cerns about a cross-media conglomerate's ability to 'bundle' packages of advertising vehicles to potential advertisers in a manner which any remaining competitors simply cannot. The resulting market advantage critically and unfairly impedes competition in truly local media markets.¹⁴ Taken further, when used as a legal firewall, vertical integration significantly reduces the potential for successful charges of collusion, since vertically integrated firms can disguise their breaches of collusive agreement through internal pricing structures. Our publishers have experienced first-hand the anticompetitive short end of the stick "in markets where there are such newspaper/broadcast combinations...such firms can be expected to employ a range of anti-competitive tactics such as cross-subsidization, predatory pricing, cross-promotion involving the marketing of multimedia advertising packages and price discrimination."¹⁵ The proponents of cross-media consolidation euphemize these ambitions in their comments to the Commission, the catchphrase "we need the ability to amortize assets across platforms" is a perennial favorite. In comments to other audiences including their peers and financial backers, they are often more candid about leveraging cross-media advantage.¹⁶

III. Local Monopoly 2.0 Will Not "Save" Journalism

Advocates of eliminating the remaining competitive safeguards in local media markets argue that "restrictions on cross-ownership undermine the potential quality and quantity of investigative news

¹⁴ See oral and written community paper publisher testimony: Gary Cunningham, Publisher, GCA Publishing, Nashville Community Newspapers, FCC Hearing Panel Testimony, Nashville, TN, December 11, 2006; Jim Haigh, Mid-Atlantic Community Papers Association, FCC Hearing Panel Testimony, Harrisburg, PA, February 23, 2007; Steve Erlanger, Publisher and Chief Operating Officer, Hometown News, FCC Hearing Panel Testimony, Tampa, FL, April 30, 2007; Patrick Manteiga, Publisher, La Gaceta, FCC Hearing Panel Testimony, Tampa, FL, April 30, 2007.

¹⁵ In their own words, our publishers have echoed the concerns shared by Daily News, L.P. at 11.

¹⁶ "We have the state's largest newspaper and the state's most watched TV station pointing people to the site every day.... It has just been a constant drumbeat of promotion, telling people that azcentral.com is the place to go. Our aggressive promotion...really helped us," explained Mike Coleman vice president of digital media for the Arizona Republic and KPNX-TV, the NBC affiliate in the waived Phoenix market, in comments to Scarborough Research. To no surprise, this competitive advantage has boosted their site to the top of traffic measures in state. Praise for the advantages of market power achieved through cross-ownership, and the corresponding leveraged aggregation of market share is echoed in a "grandfathered" market. In Tampa, bundled packages and cross-media promotions are effectively maximized to thwart competition. Tampa Tribune's market development director, Ted Stasney, states: "Our parent company also owns WFLA-TV, the NBC affiliate in the Tampa Bay area, so TBO.com has the distinction of having both newspaper and television convergence partners....This gives us tremendous promotional strength and ability to do frequent cross-promotions with our multimedia partners." See: Reply Comments of the Mid-Atlantic Community Papers Association, 2006 *Quadrennial Regulatory Review*, January 16, 2007.

reporting,” while offering proof that journalism is a good thing.¹⁷ We agree with them that journalism is vital, however we must humbly remind them that our industry is actively engaged in that noble enterprise as well. Often, we report on the local happenings that they’ve abandoned coverage of long ago. We could not disagree more with the self-serving claim that “The outdated rule does not serve any of the FCC’s stated public interest goals. To the contrary, because it disadvantages traditional media outlets with a long history of supporting local journalism and frustrates transactions that would enhance local news and informational services, the ban in reality is a hindrance to these objectives.”¹⁸ Our publishers, themselves “traditional media outlets with a long history of supporting local journalism” are boggled by the notion that our outsized rivals are “disadvantaged” by modest restrictions on their ability to simple purchase means to fatally “disadvantage” we local competitors.

Clearly, the Commission needs to ask: And what about the other local media outlets? The Commission states that it intends to investigate “consolidation,” referring explicitly to Broadcast trends following the promise: “We will take a close look at the impact of consolidation on media markets.”¹⁹ We stress that the same line of inquiry must also apply to the Newspaper Industry. In the absence of a vigilant cop on the beat, the publishing industry has undergone comparatively more profound consolidation on both the macro and micro levels. We assert that the Commission will not only gain a solid, granular perspective on the truly local media ecosystem, it will also find abundant amounts of the “predictive evidence” it expressly seeks.²⁰ History does repeat itself, and the “we need to amortize assets across” talking point was carried out ferociously in publishing. Those “efficiencies” may have been realized, but the bulk were siphoned off for debt service and dividends. The facts have been chronicled²¹ and even

¹⁷ See NAA 2010 Comments at 25.

¹⁸ *Id.* at 1.

¹⁹ See 2010 Quadrennial Review NOI at para 4.

²⁰ *Id.* at para. 65: “We invite commenters to provide predictive evidence....”

²¹ As a starting point, here are two historical snapshots along the march to consolidation in the newspaper industry. They offer ample “predictive evidence” of what will follow the elimination of remaining competitive safeguards: Stephen R. Barnett, “*Anything Goes: When a newspaper wanted to fold its JOA partner, buy its local rival or gobble up weeklies, the Bush administration was no obstacle. Will Clinton’s Justice Department be tougher?*” American Journalism Review, October, 1993. And see also: Mary Walton, “*The State of The American Newspaper: The Selling of Small-town America,*” American Journalism Review, May 1999.

a cursory look debunks this false assertion: “As a direct result of the rule, news organizations are forced to spend more money on back-office administration, and less money on expensive investigative news stories that are directly in the public interest”²²

Across America, daily newspapers already enjoy a monopoly in 99% of local communities. In virtually Everytown, USA, one paid daily holds the dominant position in print, as well as in local online traffic and advertising. In the last decades, the largest players eliminated their competition in a continuous series of acquisitions, adding link after link to daily chains and then forming wholesale regional clusters buttressed by paid and free weeklies. Our members compete with these regional print powerhouses, and from our hands-on perspective in these highly concentrated local markets, our communities cannot withstand the blunt force trauma of bold, new cross-media monopolies. Such unrivaled market force, and the corresponding tools for leverage, will obliterate all remaining prospects for fair competition. Any furtherance of anticompetitive deregulatory schemes would ultimately force what remains of independent local media to merge for their survival, and the fallout to our industry will inevitably snowball onto the entire local business community in the form of higher rates and fewer effective advertising options.

We submit that the ultimate goal of those advocating the abolishment of current safeguards is the power that comes after effective competition is neutralized by all means. It is the ability to hold demand hostage to the will of the aggregator of coveted supply, otherwise described as the ability to set prices at will. Although that might be the desire of many business owners, in most industries the idea could only ever remain a dream. Mass media ownership is intrinsically different, and the responsibilities of the Commission to the broadest public interest in this proceeding are monumental. The fifth *Review of the Radio Industry*, a comprehensive update to the FCC’s own *Media Ownership Working Group Study No. 12*, made unceremoniously public well into the last Review, revealed that the significant removal of FCC enforceable safeguards on radio station ownership has been a disaster for diversity of ownership,

²² See NAA 2010 Comments at 26.

a homogenizing force on programming and an economic hardship for dependent advertisers. The Telecommunications Act of 1996, which decapitated local and national radio ownership limits for single entities, led to a furious spiral of radio station acquisitions unprecedented in history both in volume and in single entity concentration locally and nationally.

Please consider that the quantified effects of intra-medium, broadcast radio consolidation,²³ are only one side of the equation. This outcome is the unstated but ultimate goal of deregulatory commentators. And in hometown media markets, the whole of the collateral damage will be greater than the sum of its once-independent parts. To be certain, the results of radio consolidation were neither a mystery nor a disappointment for those that engineered it. The fact that they were not duly catalogued did shock many, however, as they learned of the information through emerging channels of access. Less than a year after the FCC's safeguards collapsed, a well-placed official from a separate federal agency charged with protecting free and fair competition generally, went on record with *Advertising Age* magazine. Joel I. Kline, an assistant attorney general in the antitrust division, remarked on the wave of radio mergers and acquisitions. Mr. Kline elaborated on the discretion the Justice Department guidelines offered relating to the 40% market share standard and multiple large-share market players. He cited a memorandum he had personal knowledge of, between two merged stations, where the acquiring rival elaborates on the benefits of "working in conjunction (with the new subsidiary) to raise rates...one of the biggest reasons our rates are so low is the direct format competitor...simply raising our rates by 50%, which I think is possible, will accomplish our goal."²⁴

²³ The conclusions of the update to the FCC's Media Ownership Working Group Study No. 12 were reportedly not made available to Commissioners during deliberations on the 2002 Biennial Regulatory Review, Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 02-277, nor were they seemingly available to any petitioner in Prometheus. That body of evidence, invisible to the deliberators and therefore in the final product of deliberations, should weigh heavier now on these proceedings. The study shows continuing increases in concentration and a dramatic increase in advertising rates. From March 1996 to March 2003, the 4 firm concentration ratio increased from 83% to 92% nationally, but increases were much greater in the top 50 markets. Over the same period, radio advertising rates increased by 87% in nominal dollars or, by Mark Cooper's calculation about 74% in inflation adjusted (real) dollars. Using a standard economic calculation for the mark-up of price above cost, the Lerner Index ($L=HHI/\text{elasticity of demand}$), he estimates that two thirds of the real increase can be attributed to increased concentration. See MACPA 2007 Comments at 9.

²⁴ See *Advertising Age* magazine, February 24, 1997.

We strongly agree with commenters who remind the Commission that our nation's airwaves are a public trust, and thus maintaining a license for broadcast spectrum is a privilege, not a right. Community interests, by law and tradition, take precedent over pure profit. As many have noted now and in the past, the *Prometheus* Court held that the Commission erroneously reviewed the regulations by applying a presumption in favor of eliminating or relaxing the rules. *Prometheus Radio Project*, 373 F.3d at 394-395; *see also Cellco P'ship v. FCC*, 357 F.3d 88, 98 (D.C. Cir. 2004). Further, the Commission is clearly not under any presumptive obligation to either relax or eliminate the rules; *Prometheus Radio Project*, 373 F.3d at 394-395. In order to comply with the Court's directive, the Commission's decision must benefit 'the public interest and support its decision with a reasoned analysis.' *Id.* at 395. We urge the Commission to consider the balance of public interest in favor of the broadest public good and not in the narrowest private interests.

IV. Competition and Markets

The reasoned locational basis of the newspaper/broadcast cross-ownership rule adopted in 1975 was direct overlapping of broadcast signals and core market of circulation tied to local municipal geography. As the Commission describes, it "adopted the newspaper/broadcast cross-ownership rule 'in furtherance of our long standing policy of promoting diversification of ownership of the electronic mass communications media.'"²⁵ The Commission further stated in that Order "that its policy to promote diversity was 'derived from both First Amendment and antitrust policy sources.'"²⁶ Implicit in adopting same time and same place linkage was the basic understanding that real people live in real communities, and that lives and economies have a fixed local nexus. While some would like to stretch the operational boundaries of markets toward their competitive convenience, we join with commenters who implore

²⁵ *See 2010 Quadrennial Review NOI at para 22.*

²⁶ *Id.* at para 22, citing Amendment of Sections 73.34, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order, 50 F.C.C.2d 1046, 1048 ¶ 10 (citing *Associated Press v. United States*, 326 U.S. 1 (1945)). (1975)) ("1975 Second Report and Order").

the Commission to view local media markets as distinct functioning communities, and not as absolute abstractions.

a. Real Cities vs. Arbitrary DMAs

The prior Commission's loosening of newspaper/broadcast cross-ownership, which we steadfastly oppose, relies on the privately owned and trademarked "DMA" as the market model for the next wave of cross-consolidation. In neither size, scope nor ownership could a DMA ever be confused with its municipal namesake -- the City. Nearly half of all Americans live within the shifting borders of the twenty largest DMAs, and they live there as designated consumers, not citizens. The arbitrary and capricious boundary lines, which would determine twenty new cross-media consolidation zones, are the property of The Nielsen Company. As Commission staff can surely attest from complaints received, the proprietary mapping of a Designated Market Area designed for broadcasters to bill Madison Avenue firms for advertising, is miserably flawed in parceling the dependent local television content. As gerrymandered borders for an open season on hunting and swapping media properties, the undemocratic foundation of DMAs are a disaster.

Nielsen has decided that the Mid-Atlantic region where our members publish, has four "Top 20" so-called DMAs, and three more in their rankings between twenty-one and thirty-one. The relationship between these markets and their city-label namesakes has more to do with helping a media buyer find an abstract audience on a map or a header on a spreadsheet, than it does with the vast underlying tapestry of real, local communities. Absolutely not to be confused with cities, the New York, Philadelphia, Washington, D.C., and Cleveland DMAs lasso a combined eighty-nine counties in nine states and one district.²⁷ But while voters in New Jersey cannot vote to secede from either "New York" or "Philadel-

²⁷ Nielsen has decided that the Midwest has five "Top 20" so-called DMAs, and three more in their rankings between twenty-one and thirty-one. The relationship between these markets and their city-label namesakes has more to do with helping a media buyer find an abstract audience on a map or a header on a spreadsheet, than it does with the vast underlying tapestry of real, local communities. Absolutely not to be confused with cities, the Chicago, Detroit, Minneapolis, Cleveland and Denver DMAs lasso a combined one hundred sixty-six counties in nine different states. But while voters in thirteen Nebraska counties cannot vote to secede from "Denver," the for-profit subscription data and publishing company, by sheer whim, can lump or scoop whole counties onto, or off of, their DMAs. Simply adding a few counties onto the fifteen in Missouri or the fifteen in Illinois that currently mint the St. Louis DMA, would bring that collection of communities into the top twenty, opening yet another cross-media hunting ground, simultaneously grandfathering the terrain that dropped out of the equally arbitrary "top 20 threshold."

phia,” the for-profit subscription data and publishing company, by sheer whim, can lump or scoop whole counties onto, or off of, their DMAs. This common practice has forced Pennsylvania communities onto Nielsen’s maps of New York and D.C., and with the click of a mouse all of Erie’s media could land within the borders of Cleveland or Pittsburgh. Each scenario demonstrates its own real danger, where the somehow contiguous Cleveland DMA is already in the Top 20, and nearby Pittsburgh is just outside the arbitrary threshold at number twenty-two. Proprietary remapping in the first instance demonstrates the ease of radically expanding “intended consolidation zones,” whereas the second clearly shows the unregulated simplicity of establishing new cross-media merger-friendly markets: Simply shoving a few counties onto DMAs in the low and mid-twenties would heap those disparate communities into the Nielsen Top 20, opening vast new cross-media hunting grounds, while simultaneously grandfathering the terrain that dropped out of the capricious “top 20 threshold.”

b. Pulling the Lynchpin: MOWG Study #10 Debunked

Cross-media consolidation advocates perpetually cite a nearly decade old study that purports to describe the forms of media under current regulatory consideration as separate, distinct and non-competing markets. They cite their own assertions and the same dusty FCC study riddled with critical caveats: “newspapers and broadcasters are not direct rivals for advertising revenue and, accordingly, that the NBCO rule does not impact competition. An empirical study commissioned by the FCC in conjunction with the 2002 Biennial Review, which demonstrates that local advertisers do not view newspapers and broadcast outlets as close substitutes, amply supports these prior conclusions.”²⁸ They also continue to claim that no party has ever directly challenged the flawed conclusions of that study.²⁹ In fact, we have and continue to challenge this argument as well as the underlying data and assertions that fed Media Ownership Working Group study number 10, *On the Substitutability of Local Newspa-*

²⁸ See NAA 2010 Comments at 28.

²⁹ *Id.* at 28

per, Radio, and Television Advertising in Local Business Sales. The academic language of its summary conclusion, “estimated elasticities of substitution and the estimated ordinary cross-price elasticities suggest weak substitutability between local media,”³⁰ betrays the words and deeds of merchants on Main Street.

The conclusions are also undermined by the study’s own recognition that the data are problematic: “The following caveat must be acknowledged when considering this study in communications policy. There are limitations inherent in the underlying data. For example, local radio ad expenditures are not total expenditures on radio within a DMA because total local radio revenue is not reported. In addition, local newspaper ad expenditures are constructed through an allocation process that introduces some degree of error.”³¹ In fact, there is much more than “some degree of error,” where units of cost per point (“CPP”) are forced into equivalence with Standard Advertising Units (“SAU”), without recognition of the existence of prevailing contract rates or even a cross check of airtime or lineage actually sold. Further, expenditures for entire local business categories were possibly ignored, as classified advertising revenue was not factored into the equation. These critical categories include, but are not limited to, automotive, real estate and recruitment.

We submit that the flaws in determining elasticity run deeper, as the hodgepodge of admittedly incomplete underlying data are furnished by proprietary providers as well as by the same trade associations seeking to eliminate cross-ownership rules. Moreover, simply dividing a sample market’s incomplete advertising expenditures by number of “establishments” recognized in five year old U.S. Census Bureau surveys to achieve a “representative local business,”³² would seemingly translate into a representation of no particular business at all. Dividing the sum of advertising allocations of an orthodontist that spends no money and a furniture store that spends lots, by their sample number of two, may

³⁰ See Media Bureau Staff Research Paper Number 10, Media Ownership Working Group, *On the Substitutability of Local Newspaper, Radio, and Television Advertising in Local Business Sales*, September, 2002, at 3.

³¹ *Id.* at 11.

³² *Id.* at 11.

give you an average, but it won't describe advertising decisions and media competition on Main Street, America.

Plugging incongruous numbers into a convoluted formula that obscures real world advertising decision making and expenditures can be made to suggest on paper that a local car dealer, advertising in the local newspaper, while airing on local radio and television stations, is statistically doing all or none of the above. Anybody that has actually sold media, and encountered their counterparts from competing media on real world sales calls, knows experientially that newspapers compete with radio stations who compete with television stations for the same advertising dollars in the same local marketplace. Trade associations representing the advertiser side of this equation maintain credible databases relating to their membership's advertising expenditures by medium,³³ and a broad survey from this consumer data will surely yield more credible results, reflective of the intense cross-media competition in the local marketplace.

c. A Cautionary Case Study on Media Market Studies

As the Commission looks towards topics and analytical framework for studies to better inform this Review, we ask that it be sensitive to potential internal bias toward predetermined policy objectives. Simply put, the policy must fit the data rather than finding data to fit the policy. We respectfully raise this issue, in particular, in response to one of the draft papers, *Summary of Ideas on Newspaper-Broadcast Cross-Ownership*, released late into the prior Commission's Review. It was attributed to then FCC Chief Economist, Leslie M. Marx, and dated June 15, 2006. In the first sentence of the introduction, it stated the clear objective, "how the FCC can approach relaxing newspaper-broadcast cross-ownership restrictions," and offered what could be considered a blueprint for the manufacturing of data and stud-

³³ Here is a prime example of the need for the Commission to get better data. It could collaborate with SBA, Commerce, Labor, DOJ, FTC, Census, etc., as well as private industry and their trade associations -- with an emphasis of gathering and corroborating impartial data sets from parties without a vested interest in outcomes of proceedings relying on that data. Any move by the Commission away from the crutching on ready-made, proprietary macro-data created and sold for the purposes of Industry it regulates would be most welcome. For such an example: *See* MediaNews Group Interactive, Finding Revenue Opportunities by Working with Competitors, presented at PNA Annual Convention, November 2, 2006. Referencing: "*Dealer Associations Advertising Expenditures*," MNG Interactive had no apparent trouble in obtaining cross-media spending details for the Albany/Schenectady/Troy area automobile dealer association, which clearly demonstrate the substitutability of local newspapers, radio and television stations.

ies to support the stated policy objective.³⁴ This paper was released internally only one week before the public announcement of that *Rulemaking*, and it appeared to offer strategy, theory and even talking points, to elaborate a predetermined conclusion. Equally troubling was the fact that it even relied on a report submitted by Media General, a prolific commenter in that *Rulemaking*, advocating the lifting of current regulatory safeguards.

To summarize the *Summary of Ideas on Newspaper-Broadcast Cross-Ownership*: All markets can possibly be described as needing relaxation of current rules, either because they are competitive or because they fit the newly minted paradigm “at-risk” of losing even more news.³⁵ It proposed raising the currently recognized competitive threshold to at least 3700 HHI based on the unfortunate, historical probability of an actual FTC challenge,³⁶ dramatically redefining many markets as competitive. This left the remaining set of non-competitive markets needing an even more convoluted rationale for cross-media mergers: Such mergers will save them from the threat of losing even more news!³⁷ They can now be considered “at-risk,” and six actual “talking points”³⁸ were offered to market the new “at-risk” paradigm. The report then offered specific studies which could be construed as a means to buttress the a priori conclusions.

While the prior Commission did not entirely follow the suggested studies list, the talking points and clever “at-risk rationale” have been regurgitated whole, incessantly, by those seeking to remove the critical safeguards against cross-media monopolization. We trust that the lessons from *Prometheus* and the duty to the greater public interest will direct the Commission away from predetermined policy outcomes, and back to an objective observation of the local community marketplace, where 99% of cities have one daily newspaper, cross-media rivals really compete and media ownership is in fact highly

³⁴ See FCC Draft Paper, *Summary of Ideas on Newspaper-Broadcast Cross-Ownership*, Leslie M. Marx, June 15, 2006 at 3.

³⁵ *Id.* at 5.

³⁶ *Id.* at 7-8.

³⁷ *Id.* at 11.

³⁸ *Id.* at 13-14.

concentrated now. We assert that this also compels the recognition that the sphere of the internet, as it applies to local markets, is a most successful brand extension of the largest and most successful media properties in those markets.

d. Real vs. Abstract Competition

As we all saw in the first round of *Prometheus*, real places, with real people, engaged and fueled by real media outlets, functioning in real local economies, can be so rendered by abstraction, and redefined by equation to appear on paper as their near antithesis. Thus, the Diversity Index may have once looked to some as a plausible and convenient tool for viewing media usage in local communities, but the *Prometheus* Court, and near consensus of current commenters, called for either its revision or removal. Certain cross-media consolidation advocates continue to offers nakedly self-serving remedies that would do away with the constructs of competitive position and measures in their entirety. Under their proposal, even the Herfindahl-Hirschman Index (“HHI”) and the Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission would be scrapped. They ask the Commission to look at the local marketplace through the wildly subjective lens of “adequate variety,” rather than any quantifiable measure “market share.” “In particular, NAA believes that the FCC’s analysis of viewpoint diversity should focus on the breadth of options available to consumers in today’s marketplace, rather than the relative popularity of specific outlets at any given point in time. So long as local audiences have an adequate variety of local news and informational choices at their disposal, the audience reach, market share, or popularity of one outlet versus another should be irrelevant.”³⁹

Our industry vehemently objects to this proposal, which we view as a dishonest attempt to redefine local marketplace competition to infinity. Neither our member publishers nor their member publishers approach advertisers with the proposition that they invest their advertising dollars with their publications because the “relative audience reach” does not matter. Advertising is not successfully sold, nor are corresponding results for advertisers delivered, based on fluff of mere adequacy and total avoidance of the construct of market share.

³⁹ See NAA 2010 Comments at 32.

IV. Cross-ownership Rules Allow for Internet Investment

It would seem that if the Internet were as transformational as the energetic language offered by certain commenters and would like the Commission to believe, arguments to overturn the rules relating to mature media would be abandoned in favor of focusing all energies on maximizing current success in internet ventures. The act of leveraging internet properties and innovation are not unduly restricted by regulation, and not at all by the safeguards against newspaper/broadcast cross-ownership. The fact that certain commenters in the print and broadcast industries are still arguing for the opportunity to cross-merge, is a tacit admission that they do recognise their continued relevance and market dominance even in this new world where computers and gadgets are interconnected in real time.

Any consideration of the internet and its role in this Review must first attempt to cut through the hype. The Internet is a word that most accurately describes evolving technological platforms, and habits of users of this technology can be tracked. Doing so, in the context of local media markets, locally generated content and traffic from local citizens to that content converge overwhelmingly at the internet sites owned and operated by the local newspaper, television stations and radio stations.²⁶ These local Internet sites are brand extensions of the dominant local media providers, and the content is both a reflection and an extension of the flagship properties. Local entities create local content, thus they are the generating source of said information. Certain commenters have persistently blurred this important distinction. The Internet, by itself, does not generate content, and the “internet” as an ambiguous noun is not a “source.”

The universal statement: “More and more people are getting their news online,” tells a partial and misleading truth. When all due local consideration is given, the statement becomes, with marginal exceptions: “More people who choose to get their local news online, actually get it from the website of their dominant daily newspaper, and otherwise from their local television or radio stations.” While the local internet traffic to local news websites overwhelmingly favors media properties owned by the commenters united for cross-media consolidation, their global online partnerships and ventures have solidi-

fied their regional and national dominance of emerging, and increasingly lucrative internet platforms.

At the time of the last Review, The Project for Excellence in Journalism concluded: “‘The Internet,’ we found, describes a technology, not a style of media or a set of values or even a journalistic approach. The seven news Web sites we monitored varied widely — from Google’s emphasis on speed and bulk to Yahoo’s focus on navigability to a local TV news station’s site, largely a portal for advertising copy. Many of the most popular sites also remain largely a stepchild of print and wire-service content, especially the so-called Internet-only sites that produce no copy of their own. As a result, while the Internet has added more outlets from which to choose, it has not, our study suggests, added new topics to the agenda.”⁴⁰ It turns out, that hasn’t really changed much at all. Numerous commenters, including cross-media consolidation advocates, point to PEJ’s recent “Baltimore Study,” which drills home the accute relevance of so-called legacy media: “Researchers found that almost 95% of the local journalism in Baltimore originated with traditional media sources, predominantly newspapers. Although various digital media sources greatly expanded the range of news offerings for consumers, these new media outlets often were reliant upon the traditional media to research and create the stories.”⁴¹

It must also be stated that beyond constant relevance, traditional media at the local level are not actually losing many digital dollars to local web upstarts. Given the daily newspapers’ enviable position in the new world of the Internet, both locally and nationally, their alarmist comments regarding threats from the so-called Goliaths, Yahoo! and Google, need to be chewed very slowly. We remind the Commission that we, too, are legacy media, and are likewise facing the very same disruptive forces of technical innovation. Pounding fists on tables and screaming about the existence of “content aggregators”⁴² simply does not make owning a local cross-media monopoly a public interest. Moreover, two separate proceedings are underway, examining these precise threats and opportunities including myriad

²⁵ See Project for Excellence in Journalism, *The State of the New Media 2006: An Annual Report on American Journalism, A Day in the Life of the News*, http://stateofthemedias.org/2006/narrative_daymedia_intro.asp?cat=1&media=2.

⁴¹ See NAA 2010 Comments at 27, citing: Pew Project for Excellence in Journalism, *New Media, Old Media: The Blogosphere*, May 23, 2010, available at http://www.journalism.org/analysis_report/blogosphere.

⁴² *Id.* at 14.

cooperative agreements between “traditional media” and these new media “disruptors.”

In light of the practical realities of current ownership, continued market dominance, and the pending anti-competitive prospect of enhanced cross-media promotion and advertising sales, we stress to the Commission that “the Internet” is not an excuse for any corporation to now go and purchase a cross-media monopoly in local, hometown markets. As detailed, the Internet is not a source in itself, and is predominantly another extension of the same players on the most local level. As for so-called “citizen journalism,” it will provide another cost-cutting tool, as it is fully harvested into inexpensive, copyright free content. There is simply nothing in the “Internet” arguments we have read that compels anything but the preservation of current regulatory safeguards on cross-media ownership.

a. Safeguarding an Open Internet

Without belaboring the point,⁴³ we simply remind the Commission that anticompetitive policy outcomes in separate regulatory reviews could compound each other, the magnitudes of scale risk obliterating fair competition in the local media marketplace. The worst case scenario would be the lifting of safeguards against local cross-media monopolies -- while also allowing the newly combined online enterprise of outsized “old media” rivals to acquire unprecedented competitive advantage through the preferential treatment of traffic to their sites and platforms. As in: Their merged digital presence, already dominant in local traffic, loading at the full promise of broadband speeds -- while local rivals’ sites, and all the content and innovation they’ve invested in, stall in readers’ browsers and gadgets like paint drying.

⁴³ See Comments of the Free Community Paper Industry, *In the Matter of: Preserving the Open Internet and Broadband Industry Practices*, January 14, 2010. Also See: Reply Comments of the Free Community Paper Industry, *In the Matter of: Preserving the Open Internet and Broadband Industry Practices*, April 8, 2010.

V. Conclusion: Preserving Fair Competition

Any tampering with the newspaper/broadcast cross-ownership rules in the direction of further deregulation will most certainly trigger an unprecedented wave of cross-media consolidation, strangling the remaining competition and putting local economies at serious risk. The documented merger challenge history of the DOJ and FTC ensures that not much will stand in their way. The free community paper industry competes with the proponents of cross-media consolidation every day on Main Street. We keep Gutenberg's print legacy alive and relevant, embracing free and fair competition as modern day Town Criers, often from the short end of the stick.

In doing so we provide a service to our communities and an essential resource for local business, the lifeblood of our collective economies. We submit that the more some things have changed the more some things stay the same, including the trend toward greater consolidation in local media. As ownership shrinks to fewer and fewer capitalized concerns, some argue for new cross-media acquisition opportunities. Even as they lament their stock prices, they propose pulling local media from community reliance and subjecting them to the same whims of Wall Street. Faceless shareholders replace community stakeholders, and the fiduciary responsibilities to the parent company take precedence over the needs, concerns and values of the community.

Those who lament "heavy-handed government regulation of the media," often fail to mention their own successful pleas for privileged statutory protection. Those heavy-handed, legalized marketplace advantages include the Newspaper Preservation Act, Periodicals Mail Privileges and in most states, the exclusive market on government mandated advertising, known as Legal and Public Notice. From our position in the local media landscape, we contend that the current level of concentration in local media markets makes the ban on newspaper-broadcast cross-ownership more critical now than when it was first enacted. We urge the Commission to preserve these vital safeguards.

Respectfully Submitted,
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